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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1064~~ 170

DON D. ROBEY, *Petitioner*,

v.

SUN RECORD COMPANY, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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June 4, 1957

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SUBJECT INDEX

	PAGE
CITATION TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
RULE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	14
CERTIFICATE OF SERVICE	14
APPENDIX	15

LIST OF AUTHORITIES

CASES

Allbritton v. Madings, 138 S.W. 2d 901	11
Central Freight Line v. York, 135 S.W. 2d 186, 188	13
Dalehite v. United States, 346 U.S. 15, 24, 25, 97 L. Ed. 1427, 1431 and 1435, 73 S. Ct. 956	7
Kelley v. Everglades Drainage District, 319 U.S. 415, 420, 421, 87 L. Ed. 1485, 1488, 1489, 63 S. Ct. 1141	6, 7
Southwest Battery Corporation v. Owen, 115 S.W. 2d 1097, 1099	10
Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865	10

STATUTE

28 U.S.C. § 1254(1)	2

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52(a)	2, 3, 9, 10

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SUN RECORD COMPANY, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Don D. Robey prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on March 21, 1957, in a cause Numbered 16,197, styled Don D. Robey, Appellant, v. Sun Record Company, Inc., Appellee.

Citation to Opinions Below

The District Court wrote no opinion. The opinion of the Court of Appeals, printed in the appendix hereto, infra, p. 15, is reported in 242 F. 2d 684.

Jurisdiction

(i) The judgment of the Court of Appeals was entered on March 21, 1957, R. 631.

(ii) Rehearing was denied on April 25, 1957, R. 652.

(iii) The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

First: In this case jurisdiction of the Federal Court is based on a diversity of citizenship, and the Defendant is entitled to have any damages assessed against him limited to those allowable under State law; the trial court, sitting in this case without a jury, to sustain an award of $17,500.00 damages, did not define the specific pecuniary losses justifying such amount, but confined its finding of injury to the generality that such damage had been suffered by Plaintiff "by reason of its inability further to make" Parker records, and a "curtailment of sales" of two records previously released; the question is: Does this general finding, impossible of analysis for legal propriety under State law, satisfy for this case the requirement of Rule 52(a) that "the court shall find the facts specially"?

Second: Whether the Court of Appeals, in overruling Petitioner's contention that as a matter of law the evidence did not sustain the trial court's award of $17,500.00 damages, for loss of possible sales of phonograph records never offered for sale, and in part never recorded, has decided an important state question in conflict with applicable Texas law.

Rule Involved

The first question involved the construction of the familiar first requirement of Rule 52(a) of the *Rules of Civil Procedure*:

> "In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially * * *."

Statement of the Case

Jurisdiction vested in the District Court for the Southern District of Texas by reason of diversity of citizenship between Plaintiff, Sun Record Company, Inc., and the Defendants. The suit was instituted on March 24, 1954, by Sun, a corporation domiciled in Tennessee, against Robey and another, residents of Texas, seeking injunctions and actual and punitive damages of $100,000.00. Injunctive relief was denied because of the absence from the suit of the obligors on the contract claimed to support the action, but on a trial to the court, sitting without a jury, the trial judge, on December 20, 1955, rendered judgment in favor of Sun against Robey in the amount of $17,500.00 as the amount Plaintiff had "been damaged in its business through the tortious acts of the said Defendant, Don D. Robey" (R. 584). In findings of fact filed December 5, 1955, the trial judge determined that by contracting with one Parker, and selling records of his vocalizations, Robey had tortiously interfered with Sun's exclusive contract with Parker (R. 141-145).

The only finding by the trial judge related to any pecuniary loss by plaintiff was:

> "By reason of its inability further to make the number of records with Parker, as permitted under

its contract with him, and the curtailment of sales of those previously released, Plaintiff has suffered actual damage in the amount of $17,500." (R. 146)

Plaintiff's pleadings made no effort to define its damages in nature or extent, except to state that for actual and punitive damages it should recover $100,000 (R. 108).

Plaintiff's only witnesses were its President Samuel Phillips, its office manager, Marian Keisker, and its attorney, Grover McCormick (R. 151, 345, 399). No evidence on the matter of profits or losses was offered by Plaintiff, except for the testimony of Phillips and Miss Keisker.

The evidence relied on by Sun to show lost profits were sales[1] of 74,153 copies of the first Parker recording and of 27,433 copies of the second and last (R. 200, 203), and an "estimate" by Phillips that Sun had made a profit of 15¢ per record on the first (R. 254).

The following facts, contended by Robey to defeat Sun's claim of substantial damages, were proved by Sun's evidence:

(a) The first publication of Robey's claimed tortious interference was on December 19, 1953 (R. 219) and that the impact of this on his sales was not felt for a "few weeks" after that date (R. 320).

(b) Sales of the first record, No. 187, "began to recede" before November 1, 1953, when the second and final record, No. 192, was released (R. 307).

(c) That in November, 1953, sales of No. 192, the second record, dropped from a high of 6752 copies in

[1] Phillips "thought" these figures included substantial numbers of records given away in promotional efforts (R. 305).

one week to 1361 copies the next, and continued to slump lower through December, 1953, prior to the "impact" of the news of Robey's acquisition of Parker on the records trade (R. 308).

(d) Sun made more money in 1954 than it did in 1953 (R. 333).

(e) The business of selling records is "a highly speculative type of business"; Sun had had one record more successful than the first Parker record, and the artists who made it did not maintain popularity; "they didn't do anything after that one (R. 338); he is what is known in the trade as a one-shot artist or a one-record artist, strictly speaking" (R. 378).

(f) Parker's records were his own compositions (R. 299, 300), and "it's not a bit unusual" for a novelty feature "to go over big", and the same artist "not go over on other records" (R. 378).

(g) Plaintiff's estimate of costs on which it based its claim of net profit of 33-1/3% (15¢ per record) on records sold included no cost of overhead or the cost of the services of Mr. Phillips and Miss Keisker (R. 252); further the 15¢ figure was based on an estimate of a cost of $3000.00 for promotion, and this figure of costs "is conservative, that we spent that much and more than that much, at least that much" (R. 287).

(h) Phillips, Sun's expert on sales, could not estimate possible future sales of records (R. 319).

In the Court of Appeals, Robey contended (a) that the proof of sales of the first two Parker records, in view of the fact that the decline in sales began before Robey's alleged interference, furnished no substantial basis for a

deduction that such interference caused any determinable loss of sales of such records; (b) that anticipated profits which Sun might have made from records never identified, prepared or offered for sale, were too speculative and conjectural to be allowed under Texas law; and (c) that in any event, the proof of claimed profits on the sales of the first two records was vague and mere guesswork, and justified no award of damages for loss of any anticipated profits. In the alternative, he contended that the award of damages in a lump sum, without specifically stating the method by which the Court calculated such damages, was error, requiring a remand to the trial court.

In its appended lengthy written opinion, the Court of Appeals determined that "there is not any fixed yardstick by which the award of damages is to be measured * * *. It was Sun's theory that the sales of the second record declined because of the knowledge in the trade that Parker had made a contract with Robey. This was a question for the trial court's determination. * * *

"* * * Though damages cannot be ascertained by a fixed rule and must be based upon estimates and opinion, it does not follow that no damages should be allowed or that the award should be merely nominal * * *. We are asked to require the District Judge to specify the method by which the calculation of damages was made. The District Judge was not required to undertake such a task."

Reasons for Granting the Writ

1. The holding of the Court of Appeals that Rule 52(a) does not require the trial judge "to specify the method by which the calculation of damages was made" is in direct conflict with the holding of this court in *Kelley v. Everglades Drainage District*, 319 U.S. 415, 420, 421,

87 L. Ed. 1485, 1488, 1489, 63 S. Ct. 1141, and in *Dalehite v. United States*, 346 U.S. 15, 24, 25, 97 L. Ed. 1427, 1434 and 1435, 73 S. Ct. 956.

In *Kelley v. Everglades Drainage District*, supra, this Court, interpreting Rule 52(a) (in connection with Sec. 83(e) of the Bankruptcy Act) states:

> "* * * We hold only that *there must be findings*, stated either in the Court's opinion or separately, *which are sufficient to indicate the factual basis for the ultimate conclusion*". (Emphasis supplied)

As pointed out in that opinion, it is not the function of this Court "to search the record and analyze the evidence in order to supply findings which the trial court failed to make".

In *Dalehite v. United States*, supra, this Court said:

> We are therefore not required to weigh each finding anew as "clearly erroneous". They were characterized below as "profuse, prolific, and sweeping". We agree. Fed. Rules Civ. Proc., Rule 52(a), in terms, contemplates a system of findings which are "of fact" and which are "concise". *The well-recognized difficulty of distinguishing between law and fact clearly does not absolve district courts of their duty in hard and complex cases to make a studied effort toward* [illegible]*iteness. Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied.* Kelley v. Everglades Drainage Dist. 319 U.S. 415, 87 L. Ed. 1485, 63 S. Ct. 1141, and cases cited. Otherwise, their findings are useless for appellate purposes. In this particular case, no proper review could be exercised by taking the "fact" findings of "negligence" at face value. And, to the extent that they are

of law, of course they are not binding on appeal. E. g., Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp. 340 US 147, 153, 154, and concurring opinion at 155, 156, 95 L ed 162, 167, 168, 169, 71 S Ct. 153.

2. If the holding of the Court of Appeals that findings of specific pecuniary loss are not required as preliminary to the award of damages, is not in fact regarded as in conflict with the above cited decisions of this Court, then it is believed that the holding is sufficiently important to the general conduct of litigation and so clearly wrong as to require correction by this Court.

It cannot be said that the trial court found "specially" the facts of monetary loss. Its finding of a loss of sales, itself indefinite and completely general, does not pass upon the issue, made by the evidence, as to whether profits would have resulted from sales. The finding as made furnishes no clue as to the extent the court found losses from sales of records ready for manufacture or from sales of records not yet recorded. Obviously, this mere finding of damages, without indicating the character or the extent of any pecuniary loss suffered by plaintiff makes virtually hopeless the task of the briefer and the court on appeal.

The trial court finding discloses that in some fashion the trial court took into account (a) the inability to make further records, and (b) the curtailment of sales of those previously released. The extent to which this finding was intended to include a loss of profits, a loss of good will, or a loss of investment are impossible to determine from the Court's findings. If investigation of the entire evidence is required in an effort to determine the probable intent of the trial court in the finding of damages, then

the entire purpose of the rule for specific findings is defeated.

The Court of Appeals apparently felt that to require the District Judge to indicate a specification of the calculation by which he arrived at the amount of damages would impose upon him an onerous and distasteful task. It is here contended that in this case, the trial judge will have difficulty locating in the evidence the factual basis to support his award of damages. The writer most sincerely feels that he cannot. And in earnestness also, if trial judges are to be allowed to select amounts of damages at random, and Courts of Appeals refuse to "retry the issue of damages", as here, then, for Robey, his purse is open to the whimsy of the courts, and constitutional guaranties of "due process" become farcial. Surely, in depriving Robey of his $17,500.00 the trial judge made some calculation! What judicial discourtesy is involved in requiring his disclosure of it?

As will be pointed out in a discussion of the second question, the Texas rule requires that damages in situations here present be determinable by some method arriving at a figure "reasonably certain". In all cases passing on this subject it is settled that damages for lost profits may be determined by some rational approximation. To say that the Judge is not required to set out in his findings the method by which his approximation is reached is at once to say that he is not required to make one, and to deprive the litigant of his right to review of the principles of law taken into account by the Judge in arriving at the amount of damages. It is believed that the holding of the Court of Appeals is in direct contravention of the plain meaning of Rule 52a and in complete disregard of your honors' holdings in the cases above cited.

In this case, Don D. Robey has expended, conservatively speaking, at least $2500.00 in costs and interest in an effort to have his rights in the matter of damages passed upon by the Court of Appeals. He stands to lose $17,500.00 to a judgment which he believes founded upon a measure and proof of damages which violate the laws of Texas.

Even if the injustice done him by the Trial Court's generalized findings is not sufficient to justify the intervention of this Court, it is most urgently submitted that to prevent the destruction of the virtues of simple procedures contemplated by Rule 52A, this Court should take jurisdiction of this petition and revise the holding of the Court of Appeals that specific findings are not required.

3. Under applicable Texas law, damages for lost profits are recoverable only when the probabilities of profit and the loss of them through an actionable wrong of the Defendant are established with reasonable certainty. The Court of Appeals in the case at bar has held that there is no fixed yardstick with which to measure such damages, that the trial court was not obliged to make or determine any calculation of the approximate amount of losses and to all intents and purposes has completely disregarded the Texas law on the subject. If these holdings are permitted to stand, all of the evils resulting from *Swift v. Tyson*[2] have returned to the Federal system.

In 1938, in the case of *Southwest Battery Corporation v. Owen*, 115 S.W. 2d 1097, 1099, the Supreme Court of Texas, its court of last resort in civil cases, said:

> "The rule denying a recovery where the facts show that such profits claimed are too uncertain or specu-

[2] 16 Pet. 1, 10 L. Ed. 865.

> lative, or where the enterprise is new or unestablished, is still enforced, on the ground that the profits which might have been made from such business are not susceptible of being established by proof to that degree of certainty which the law demands. 13 Tex. Jur. p. 207, §108; p. 216, §115; 17 C. J. pp. 790, 791, and cases cited in notes."

In *Allbritton v. Madings*, 138 S.W. 2d 901, the Texas Court of Appeals, in denying a recovery for a claimed interference with a contractual right, says:

> "In suits in which recovery is sought for loss of profits in an enterprise not established at the time of the breach of contract, it is held that the profits which might have been verified from plaintiff's business are not susceptible of being proved to the degree of certainty which the law demands, and that no recovery may be had, for the reason that there is no basis for estimating the profits which would have been earned, and further that it is not certain that any profits would have been made from the operation of the business (citing authorities.)"

The evidence above set out demonstrates that the business of publishing and selling Parker's future records was a highly speculative matter, bringing this case squarely within the Texas rule.

An additional compelling consideration in the case at bar is that the plaintiff actually brought no real information to Court. Its figure of a profit of fifteen cents per record, relied on to overcome Robey's proof by books that three and one-half cents is more realistic, was not claimed to be even a good guess. Its sales were "proved" by a list of sales "taken from" unidentified and unproduced business records (R. 309). The total sales relied on to prove

the extent of sales and to "calculate" profits, apparently included records given away in promotion (R. 305). It thus appears that, as approved by the Court of Appeals, whatever figures this trial judge employed must have pyramided estimates on estimates, opinions on opinion, inferences on surmise.

As stated by the Texas Court of Civil Appeals in *Central Freight Line v. York*, 135 S.W. 2d 186, 188:

> "While the law authorizes one to recover profits as a natural consequence of a breach of a contract, it requires that such damages for loss of profits be proved with reasonable certainty; and that no recovery can be had for loss of profits which are uncertain, contingent, conjectural, or speculative. The cases also hold that no recovery can be had for loss of profits where it is uncertain whether any profits at all would have been made. Of course, the authorities recognize that to some extent profits must necessarily be uncertain and problematical, and a complainant cannot be deprived of remedy merely because of the uncertainty of the amount of profits; *but the law does require absolute certainty of data upon which loss of profits are to be estimated, and such data must be based upon substantial evidence and not wholly upon speculation and conjecture.*"

The Court of Appeals regarded the estimates of sales of the first two records as sufficient to indicate that more records would have been sold in the future but for Robey's interference. The burden of proof on this issue was on the plaintiff. The proof showed that declines in the sales of both records had begun prior to the impact of Robey's alleged interference on the records trade. Proof of the decline of sales is obviously as consistent with the inference that Parker's popularity among buyers was not consistent

as it was with the inference that the records would have sold more copies but for Robey's interference. As a matter of simple logic, if factual data is as consistent with an unfavorable inference as with a favorable one, it cannot be regarded as satisfying the requirements of the burden of proof. This compels the conclusion that the Trial Court was required to speculate as to whether future sales would have been made and whether the sales would have been sufficient to bring profits to Sun. This is the reason for the Texas rule that the data must be certain before it can serve as a basis for assessment of lost profits. It clearly demonstrates that the Court of Appeals in this case has permitted the Trial Court to speculate as to whether profits would have been made and, in addition, to determine the extent of lost profits based solely on conjecture.

Sun, in its brief on file in the Court of Appeals, states, "We believe that the Trial Court could well have entered a judgment for treble the amount of damages awarded against the Appellant based upon the evidence which was adduced in this trial." Such was and is the state of the record in this case, that if any damages above nominal damages are sustained by the evidence, their upper limits is fixed only by the imagination of the Court, because the second dollar of such damages is pure speculation. The "reasonable certainty" required by the Texas law on the subject is most obviously missing.

The rule of damages for lost profits has been the subject of many judicial problems and much litigation. The holding of the lower courts in this case will open the Federal Courts to an avalanche of contentious plaintiffs who, like Sun, will prefer the claim of tortious interference to the business hazards of contractual performance.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

HARRY DOW
Counsel for Petitioner

Of Counsel:
JOEL W. COOK
WILLIAM H. SCOTT, JR.

June 4, 1957

Certificate of Service

The undersigned Morris Pepper, counsel for respondent in the foregoing petition for writ of certiorari, hereby acknowledges receipt and accepts service of a copy of such petition and its appendix, this _____ day of _____, 1957.

MORRIS PEPPER
Sterling Building
Houston, Texas

Signed and acknowledged before me, this the _____ day of _____, 1957.

Notary Public in and for
Harris County, Texas

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,197

DON D. ROBEY, *Appellant*,

VERSUS

SUN RECORD COMPANY, INC., *Appellee*

Appeal from the United States District Court for the Southern District of Texas

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(March 21, 1957)

Before CAMERON, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Herman Parker, known as "Little Junior", was a blues and rhythm singer with a limited reputation in and around Memphis, Tennessee. On June 18, 1953, he and four others known as "The Blue Flames," a group of instrumental musicians, made a contract with Sun Record Company, Inc., a Tennessee

corporation having its principal place of business in that State. The Blue Flames are not involved in the matters before us. By the contract Parker agreed to record eight phonograph record sides and more if Sun should require. The agreement gave Sun the exclusive services of Parker in the record making field and contained an express covenant that, during the life of the agreement, he would not record for anyone else. The contract was for the period of a year, and Sun had the option to extend the term for an additional year. The renewal option was exercised. Four records (eight record sides) were made. The first of these, with "Feelin' Good" on one side and "Fussin' and Fightin' Blues" on the other, was released on July 18, 1953, and soon became listed as one of the top blues and rhythm records in popularity and sales.

On September 4, 1953, the appellant, Robey, a resident of Texas, entered into a contract with Parker. It had, in substance, the same terms as Parker's prior contract with Sun except that the amount which Parker was to receive for his services was somewhat more and the term was for a longer period. In November of 1953 Sun released the second of the Parker records and its initial sales were good. Sun did not then know but soon thereafter learned of the contract between Parker and Robey. On December 3, 1953, Sun advised Robey that Parker was under contract to it. Robey was then making or preparing to make the first of his Parker records. He declined to recognize the contract of Parker with Sun thereafter made and released several Parker records. Sun brought suit in the United States District Court against Robey for wrongful interference with the contractual relationship between Parker and Sun and for wrongfully inducing the breach by Parker of his contract with Sun.

The case was tried without a jury, findings of fact and conclusions of law were made, and judgment was entered in favor of Sun and against Robey, for $17,500.00 actual damages. Exemplary damages were denied. A motion was made to set aside the judgment, for a new trial, and to amend the findings of fact. After denial of the motion this appeal was brought.

The contentions of the appellant, Robey, are (a) that the findings of the trial court, essential to its judgment, are unsupported by, or at least contrary to, the great weight to the evidence, (b) that the court erroneously awarded damages for anticipated profits which were speculative and conjectural both as to existence and amount, (c) that the trial court's failure to find the formulae by which the $17,500.00 award was settled upon is a procedural error in violation of the requirement of specific fact findings, (d) that the introduction of trade journals to prove the facts stated therein was error, (e) that the undisputed evidence shows that appellee failed to mitigate its damages, and (f) that the contract between Sun Record Co., Inc. and Parker was not valid and no liability existed for inducing a breach thereof.

This is a typical case calling for the application of the rule that recovery may be had for the wrongful procurement of a breach of contract by one not a party to it. The doctrine has roots in the medieval Ordinance of Labourers, 1349, 23 Edw. III Ch. 1. The leading English case and the one from which our present jurisprudence stems is *Lumley v. Gye*, 1853, 2 El. & Bl. 216, 118 Eng. Rep. 749, 1 Eng. Rul. Cas. 707. In Texas the rule was introduced in 1903 by *Raymond v. Yarrington*, 96 Tex. 443, 72 S.W. 580, 73 S.W. 800, 62 L. R. A. 962, 97 Am. St.

Rep. 914, where *Lumley v. Gye* and a number of other cases are reviewed. The rule was announced that a person who induces a party to a contract to break it, intending thereby to injure another person or get a benefit for himself, commits an actionable wrong. From *Temperton v. Russell*, 1893, 1 Q. B. Div. 715, the Supreme Court of Texas quoted with approval the following, "I presume that the principle is this, viz, that the contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation". The courts of Texas have applied the rule in many circumstances. 25 Tex. Jur., 31 et seq., Interference § 2.

The trial court found:

> "Under date of June 18, 1953, the plaintiff Sun Record Company, Inc., of Memphis, Tennessee, entered into a contract with Herman Parker (together with certain other individuals, of no materiality here) which is in evidence and to which reference is made. Among other things, the contract provided for the exclusive services of Parker for the purpose of making phonograph records, and contained an express negative covenant to the effect that Parker would not perform (for the purpose of making phonograph records) for any other person, firm or corporation during the period of such contract. The contractual period was for one year, renewable for a second year at plaintiff's option. The necessary notice to exercise such option was given by the plaintiff April 30, 1954."

"At the time of such contract, Parker enjoyed a very limited reputation in and around Memphis. He was unknown as a recording artist or in the recording field. Due in large part to the recognition of certain talent in Parker, and training which Parker received from and under plaintiff, and as a result of the advertising which plaintiff provided, the first record which Parker made for plaintiff under its contract above mentioned met immediately with a high degree of success and, for a while at least, was among the top few records in the 'Blues and Rhythm' field in popularity and number of sales throughout the country. This record was released July 18, 1953.

"On September 4, 1953, the defendant Robey, signing as 'Duke Records by Don D. Robey, President,' entered into a contract with Parker providing for the making of phonograph records. The contract is in evidence and is referred to. In most particulars, it is similar to the earlier contract which Parker had with plaintiff. It provides a slightly higher remuneration for the musician and was to extend for a period of three years. The execution of this contract was not announced to the trade until a number of weeks thereafter.

"I find that at the time of making the contract with Parker, the defendant Robey knew of Parker's prior contract with plaintiff, and from well recognized practices and customs in the industry, he knew that in all reasonable probability such contract contained an express provision for the exclusive use of Parker's Services by plaintiff

and a negative covenant that Parker would not make records for anyone else. Despite this knowledge, *before* the contract was signed with Parker, the defendant Robey made no effort, through plaintiff or any other source to ascertain the true facts in this regard. In fact, he was anxious to conceal from plaintiff his dealings with Parker. *After* the contract was entered into, and before incurring expense thereunder, Robey made no inquiry other than to 'clear' his contract with Parker with the musicians' union. This 'clearance' meant (a) that Parker was in good standing with the union, (b) that Robey's business was affiliated with the union, and (c) that no prior contract for Parker's services was on file *with the union*.

"Without knowledge of defendant's contract with Parker, plaintiff released a second Parker record in November, 1953. This record met with considerable popularity, although not to the extent of the first.

"Defendant admittedly had actual knowledge of plaintiff's contract with Parker, on December 2 or December 3, 1953, by means of long distance telephone conversation with the president of the plaintiff corporation and with its attorney. At the time of receiving such phone call, the defendant Robey was in the process or had made definite arrangements looking toward the recording of his first record by Parker. As he incurred an expense of several hundred dollars in connection therewith, and because of his contention that plaintiff's contract was invalid and unenforceable because

plaintiff was not affiliated with the musicians' union, defendant declined to recognize any exclusive right of plaintiff to Parker's services, and proceeded to make and release Parker's records during the next several months.

"Defendant's contracting with Parker when he either had actual knowledge or was chargeable with knowledge of plaintiff's contract and the terms thereof, and his recording and releasing of Parker's records under his own contract, was done deliberately and willfully, with knowledge of plaintiff's rights, and was done purely for commercial and competitive purposes.

"By reason of the announcement through trade publications and otherwise of the fact that the defendant had Parker under exclusive contract, the sales by plaintiff of Parker's records previously released were adversely affected. Plaintiff considered it inadvisable thereafter to release other records that Parker had made for plaintiff prior to his contract with the defendant. Parker never offered to make further records for plaintiff after his contract with the defendant. By reason of its inability further to make the number of records with Parker, as permitted under its contract with him, and the curtailment of sales of those previously released, plaintiff has suffered actual damage in the amount of $17,500.00."

We need not indulge in an extended review of the testimony on which the findings were based, testimony which in several material respects was in sharp conflict. Our

duty is fixed by the rule which provides that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a). Although Robey contends otherwise, the findings that Robey employed Parker with knowledge of and in wilful disregard of Parker's contract with Sun are supported by substantial evidence, they are not against the weight of the evidence or induced by an erroneous view of the law. We are not persuaded that a mistake has been committed or that the findings do not reflect the truth and right of the case. 2 Barron and Holtzoff, Federal Practice and Procedure 833, §1133; *Western Cotton Oil Co. v. Hodges*, 5th Cir. 1955, 218 F. 2d 158. Robey urges that it is not shown that he induced Parker to breach his contract with Sun, and that proof of his knowledge is not enough. The beliefs of Robey that Parker would breach or had breached his contract with Sun or his belief that such contract was without validity because not approved by a union, if such beliefs were entertained, would not absolve Robey from his tortious act. Robey's intentional making of a contract with Parker and proceeding to carry out such contract, knowing that the performance by Parker of the contract with him would be contrary to and in violation of Parker's contractual duty to Sun, is enough to show the inducement of the breach. *Meyer v. Washington Times Co.*, D.C. Cir. 1935, 76 F. 2d 988, cert. den. 295 U.S. 734, 55 S. Ct. 646, 79 L. Ed. 1682. Cf. *Thomason v. Sparkman*, Tex. Civ. App. 55 S.W. 2d 871; *Westinghouse Electric & Mfg. Co. v. Diamond State Fibre Co.*, D.C. Del. 1920, 268 F. 121.

A specific objection is made to the receipt in evidence of trade journals. These were offered and received for the purpose of showing that the record of Little Junior had a degree of public reception. For this limited purpose the admission of the journals was proper. *St. Louis I.M. & S. Ry. Co. v. Gunter*, Tex. Civ. App. 86 S.W. 938; *Leas v. Continental Fruit Express*, Tex. Civ. App., 99 S.W. 859, 110 S.W. 129; *Western Union Tel. Co. v. Gilliland*, Tex. Civ. App., 130 S.W. 212; *Western Union Tel. Co. v. Eckhardt*, Tex. Civ. App., 2 S.W. 2d 505. In any event there was other evidence to the same facts so that if it were error to admit these journals it would be harmless and it is to be presumed that the court disregarded all incompetent evidence. *Thompson v. Baltimore & Ohio Railroad Co.*, 8th Cir. 1946, 155 F. 2d 767.

It is contended by Robey that the award of damages is conjectural, uncertain and speculative. In determining the amount of damages for the interference with a contract for the personal services of a musical artist, and we will not deny those who had and those who sought the right to his services the privilege of regarding him as such, there is not any fixed yardstick by which the award of damages is to be measured. There was a heavy sale of the first record made by Parker for Sun. The sales of the second record started well but declined rapidly. This urge by Robey as showing that Parker's career was coming to a close and the interference by Robey, if any there was, did not result in damages. But, as Sun contends, it may be that the heavy sale of the first record might have been attributable to the skillful guidance of Sun as much as to the talents of Parker. It was Sun's theory that the sales of the second record declined because of the knowledge in the trade that Parker

had made a contract with Robey. This was a question for the trial court's determination.

Robey insists that Sun could have and should have minimized its damages by releasing the other records which Parker had cut for it. Sun, however, was of the belief that it could not sell Parker's records in profitable quantities after he had been induced to deflect to Robey. These are matters which were urged before the trial judge. They were matters for his determination. On review we are not to retry the case or to fix the amount of damages according to our notions as to the value of the injury which has been inflicted and sustained. *Sanders v. Leech*, 5th Cir. 1946, 158 F. 2d 486. "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery". *Straus v. Victor Talking Mach. Co.*, 2d Cir. 1924, 297 F. 791, 802; *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544; *Bigelow v. R.K.O. Pictures*, 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652, reh. den. 327 U.S. 817, 66 S. Ct. 815, 90 L. Ed. 1040. Though damages cannot be ascertained by a fixed rule and must be based upon estimates and opinion, it does not follow that no damages should be allowed or that the award should be merely nominal. *Story Parchment Co. v. Paterson Co., supra.* We are asked to require the district judge to specify the method by which the calculation of damages was made. The district judge was not required to undertake such a task. Our duty is to determine whether the finding as to the amount of damage was clearly erroneous. *Sanders v. Leech, supra.* We are of the opinion that the finding was proper.

It is asserted by Robey that the contract between Sun and Parker was void for want of consideration, had been induced by fraud and had been repudiated by Parker. There was a valid consideration for the making of the contract and further consideration passed when Parker made recordings and received royalties. Parker was not relieved from his obligation to Sun merely because Sun had the option, rather than being obligated, to use Parker in making other recordings during the contract period. "A contract may be so made as to be optional on one of the parties and obligatory on the other, or obligatory at the election of one of them; and mutuality of obligation is not essential where there is any consideration for a contract other than mutual promises, as in the case of options and other unilateral contracts, which are supported by a consideration." 10 Tex. Jur. 157, Contracts, §92; *Guaranty Mortgage Co. v. Nowell*, Tex. Civ. App., 72 S.W. 2d 354; *Guaranty Building & Loan Co. v. Nowell*, Tex. Civ. App. 76 S.W. 2d 830.

Parker testified that he asked Phillips, President of Sun, if he was a member of the union and received an affirmative reply. In the cross-examination of Phillips were the following questions and answers:

> "Q. Had you asked any of them [Parker and the Blue Flames] if they belonged to the American Federation of Musicians?
>
> "A. No, I didn't.
>
> "Q. You didn't tell them that you did belong to it?
>
> "A. No, I didn't, I don't remember specifically whether I did or not, but I would say offhand that I did not.
>
> "Q. That you didn't?
>
> "A. That's right."

We do not think this by any means establishes any misrepresentations to Parker by Phillips or that anything said or unsaid about the union influenced Parker to enter into the contract with Sun. But whether so or not, Robey, as an intermeddler, cannot avail himself of any such defense even though Parker might have asserted it in an action against him for breach of contract. Citing many authorities to support its statement, the Texas Court of Civil Appeals has said:

> "In our opinion the correct rule is that if a person with knowledge and fraudulent intent induces a party to breach his contract with another, such person is liable in damages though the breached contract may be unenforceable as between the contracting parties because of the statute of frauds". *Yarber v. Iglehart*, Tex. Civ. App., 264 S.W. 2d 474, 476.

Such rule is also applicable here.

As to the contention that Parker had repudiated the Sun contract before Robey dealt with him, it is enough to say that, upon more than ample evidence the district court found otherwise and correctly so.

Other points urged by Robey are without merit and need not be discussed. We find no error and the judgment below is

AFFIRMED.